



August 18, 1999

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756

OR99-2343

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125858.

The Texas Department of Health (the "department") received a request for information concerning "compliance of Nurses Home Healthcare in the Medicare program." You contend that the requested information is confidential under section 552.101 of the Government Code.

Section 552.101 requires withholding, *inter alia*, information made confidential by statute. You cite to title 42, section 1306(a) of the United States Code and title 42, section 401.101 of the Code of Federal Regulations. The former provision, in subsection (a), prohibits disclosure of "any file record, report, or other paper, or any information" obtained at any time by or from the head or employees of the United States Department of Health and Human Services, except as the head of the agency prescribes by regulation and except as otherwise provided by federal law. You represent that section 3300 of the HCFA State Operations Manual states that section 1306(a)'s prohibition against disclosure applies to state survey agencies.

You explain that the department and the Department of Health and Human Services has entered into a Title XVIII Medicare 1864 Agreement whereby the department is the state survey agency with the primary responsibility of implementing the survey and certification provisions of the Medicare program. Moreover, you explain that in carrying out your duties under the 1864 Agreement the department "obtains and creates a variety of types of documents relating to Medicare facilities and agencies."

You ask whether section 1306(a) requires you to withhold the following submitted documents: 1) a report of contact, 2) a Medicare/Medicaid certification and transmittal sheet, 3) a home health agency survey and deficiencies report, and 4) general correspondence. You also cite to subsections (e) and (f) of section 1306. Those provisions require the public disclosure of certain “official reports” by the Secretary of the Department of Health and Human Services, including “program validation survey reports and other formal evaluations of the providers of services, including the reports of follow-up reviews.” However, such official reports “shall not identify individual patients, individual health care practitioners, or other individuals” provided that the entity whose services are being evaluated has had the opportunity to review and comment on the reports. 42 U.S.C. § 1306(e), (f).

You represent that HCFA Form 2567, a statement of deficiencies, is an “official report” that must be released in accordance with section 1306(e)(3) and (f). The submitted “Home Health Agency Survey and Deficiencies Report” appears to be a similar document, and thus, must be released in accordance with section 1306(e)(3) and (f). *Id.* § 1306(e)(3) (program validation survey reports and other formal evaluations of performance of providers of services made available for public inspection); 42 C.F.R. § 401.133(a) (statements of deficiencies and survey reports on providers of services prepared by state agencies made available to the public).

Next, we consider whether the submitted correspondence is confidential under section 1306(a). The letter is from the department to the provider. It was created by the department and does not contain information that was obtained by the department in carrying out the 1864 Agreement. Thus, the correspondence is not confidential under section 1306(a) and must be released.

As for the “Medicare/Medicaid Certification and Transmittal” document, you represent that it is not part of the “official report,” survey report, or other formal evaluation of the performance of providers under section 1306(e) or section 401.133(a) of the federal regulation. You further state that HCFA has never instructed you that the document is an “official report.” You assert that because federal law does not require release of the document, it must be withheld under section 1306(a). Moreover, you inform us that “[t]hese surveys were conducted to determine compliance with Medicare regulations and are not . . . complaint investigations.” Based on your representations that the information in this document was obtained in the course of carrying out your duties under the 1864 Agreement and that it is not an “official report,” we agree that you must withhold this document under section 1306(a).

Lastly, you ask whether you must withhold the submitted report of contact under section 1306(a). As we stated above, based on your representation that the information was obtained in the course of carrying out your duties under the 1864 Agreement, the report of contact falls within the scope of section 1306(a). We note that the report of contact appears to be a report of the investigation that the department does not intend for the provider to review and

comment upon in accordance with the review procedures mandated by subsection (f) for all official reports in subsection (e). Moreover, we do not have sufficient information to determine in this instance that the report of contact is an "official report" that must be released in accordance with subsections (e) and (f) of section 1306 and section 401.133 of the federal regulation. Therefore, the report of contact must be withheld under section 1306(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Yen-Ha Le'.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref:: ID# 125858

Encl. Submitted documents

cc: Mr. Jim McElhatton
Beaumont Enterprise
P.O. Box 3071
Beaumont, Texas 77704
(w/o enclosures)